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No. 86-553

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

STATE OF CONNECTICUT, Petitioner

v.

JOSEPH WHELAN, Respondent

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

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November 1, 1986

31pp

QUESTIONS PRESENTED

I. MAY AN ERRONEOUS INSTRUCTION, WHICH CHARGED THE JURY IT MAY INFER THE ESSENTIAL AND DISPUTED ELEMENT OF INTENT FROM SURROUNDING CIRCUMSTANCES BY "A MORE PROBABLE THAN NOT" STANDARD, BE CURED BY INSTRUCTIONS THAT THE STATE MUST PROVE ITS CASE BEYOND A REASONABLE DOUBT?

II. [As stated by the petitioner] WHETHER AN ERRONEOUS INSTRUCTION ON THE STANDARD OF PROOF SHOULD BE SUBJECT TO HARMLESS ERROR ANALYSIS?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Joseph Whelan respectfully requests the Court deny the petition for writ of certiorari, seeking review of the Connecticut Supreme Court's opinion. That opinion was decided on 8/5/86 and is reported at 200 Conn. 743, ___ A.2d ___ (1986).

JURISDICTION

This Court lacks jurisdiction over question II because the issue of whether the harmless error standard of Chapman v. California, 386 U.S. 18 (1967), and/or Rose v. Clark, ___ U.S. ___, 106 S.Ct. 3101 (7/2/86), applied to the erroneous instruction was "not pressed" below by the petitioner, nor was it passed upon by the Connecticut Supreme Court. 28 U.S.C., sec. 1257(3); Illinois v. Gates, 462 U.S. 213, 217-21 (1983). The petitioner failed to raise the issue in the state appeal, either by addressing it in his appellee brief; App.A at 1A-3A; See Conn. Prac. Bk. (Rev. to 7/1/86), sec. 3060G; or in a motion for reargument; See Conn. Prac. Bk. (Rev. to 7/1/86), sec. 3111-2. The "not passed upon" criteria is fulfilled according to the petitioner's own argument. Pet. at 14-7. *1/

1. The respondent takes the position this was "not passed upon" solely on the basis of the petitioner's argument. He disagrees strongly with the petitioner's assessment that harmless error was refused. Infra, the respondent argues: that the petitioner has confused the evidentiary harmless error rule of Chapman and Rose v. Clark with the "whole charge review," of Cupp v. Naughten, 414 U.S. 141 (1973); and that the Connecticut Supreme did review the whole charge and also effectively undertook a harmless error review.

STATEMENT OF THE CASE

The respondent adopts the petitioner's facts, except for the following revisions, corrections and additions.

1. The Crime. Any assertion, direct or indirect, that the respondent started the fight by attacking the decedent, John Matulionis, is inaccurate. None of the three petitioner's witnesses who were present at the bar could state who started it or how it started. T.81,94,126-7,183; See Whelan, 200 Conn. at 745. The respondent, the only person to testify he knew how it started, said Mr. Matulionis attacked him first, and the respondent acted thereafter to defend himself. T.210-6. While it is true the state's version of how the fight proceeded differed markedly from the respondent's, *2/, there was no evidence Mr. Whelan started it.

Nor was there any direct evidence the respondent had any intent other than to defend himself. To prove criminal intent, the petitioner relied entirely on circumstantial evidence. T.244-6,273,285.

Direct evidence did established that Mr. Matulionis, a muscular well-built man weighing over 200 pounds, T.48-9, had not only been at the bar most of the evening preceding the fight, Pet. at 1, but also had been drinking alcohol for three hours and had taken drugs. T.51,56,60-2,108. To the bartender (a state's witness), he did not appear sober. T.62,108. Blood tests done as part of the autopsy confirmed Mr. Matulionis' intoxication: he had an alcohol level one and one-half times the maximum legal intoxication level; and over the maximum effective dosage of the drug propoxyphene, a methadone-like narcotic. T.51,54,56-7. Mr. Matulionis had a criminal record for assault, reckless endangerment and carrying a pistol without a permit. T.233-4; Ex.2,3,4. The autopsy also discovered circumstantial evidence of a fight: he had bruises on his knuckles. T.52.

2. The Jury Charge. The charge given was not "a standard instruction." Pet. at 2. There is no factual support this was "standard." Legally, standard references for jury instructions in Connecticut are Wright, Connecticut Jury Instructions (2d Ed. 1975), and Borden & Orland, Connecticut Criminal Jury

2. The Connecticut Supreme Court also did not find what the petitioner asserts, that the respondent was aided in the fight by a third person, Nicholas Romano. 200 Conn. at 745; Pet. at 1-2. The respondent's version was that he was attacked by Mr. Matulionis and fended him off alone. T.210-6.

Instructions (1986). Neither authority includes the "more probable than not" standard in their circumstantial evidence charges in criminal cases; inferences from circumstances to ultimate facts such as intent must be "beyond a reasonable doubt." Wright, sec. 655e; Borden & Orland, sec. 3.1.

In the jury charge, the trial court instructed twice on how to determine intent and both times incorporated the previously given circumstantial evidence rule, thereby linking the "more probable than not" standard to the jury's process of finding the essential element of intent. T.300-01,306-7. It charged that in the absence of direct evidence the only way to determine intent was to infer it from the surrounding facts and circumstances. Id. It commented that the case on intent was circumstantial and that the petitioner "asks you to infer that Mr. Whelan's intent was to cause the death ..." T.301. The court never corrected or modified its instruction that inferences — even those going to an element of the crime — may be found if they were "more probable than not."

The court also charged on three lesser included homicide offenses. T.304-14. The major distinction among these was the element of intent which ranged from intent to cause death to recklessness. Id. After deliberations had begun, the jury requested and received a recharge on the definition of these lesser offenses. T.332-5.

Although this was a brief trial with few witnesses, the jury deliberated for about ten hours over two days before returning their verdict. T.326,331, 335,337.

3. The Petitioner's Brief In State Court. In its brief to the Connecticut Supreme Court, the petitioner did not request the court to apply the harmless error standard of Chapman or Rose v. Clark. App. at 1A-3A. It did not argue the evidence was so overwhelming as to make the error harmless beyond a reasonable doubt. Id. It sole request was that the error be reviewed in the context of the rest of the instructions, not the entire record. App. at 1A-3A.

4. The Connecticut Supreme Court's Opinion. The opinion did not hold that all inferences in a criminal case must be beyond a reasonable doubt, only those affecting ultimate facts such as the defendant's "intent to cause the death of a person." Whelan, 200 Conn. at 758. The court held the circumstantial evidence charge infected the definition of proof beyond a reasonable

doubt by charging the jury "the only way to determine intent was to infer it from the facts," 200 Conn. at 757, thus "permit[ting the jury] to draw the inference of intent, necessary to a finding of guilty, based on the erroneous probability standard." 200 Conn. at 758.

Even where ultimate facts are affected, the court will not necessarily reverse. 200 Conn. at 756-7. It will always review the rest of the charge — either under close scrutiny or otherwise — to determine if the jury was possibly misled. 200 Conn. at 757, 758. There is no indication whatsoever that it "effectively created a per se rule." Pet. at 4. It specifically acknowledged it reviewed the rest of the instructions here and found the error was not cured. 200 Conn. at 758.

The court also stated it looks to the evidence to determine whether the case "'particularly called for a correct instruction on the meaning and utilization of circumstantial evidence in a criminal case.'" 200 Conn. at 757. Here, circumstantial evidence and intent were factually in dispute and the focus of the case. Id.

REASONS FOR DENYING THE WRIT

I. THE PETITIONER'S ARGUMENT I IN ITS REASONS FOR GRANTING THE WRIT NEITHER WAS RAISED BY THE PETITIONER BELOW, NOR IS IT RAISED IN THE QUESTION PRESENTED IN THIS WRIT.

The first Question Presented by the petitioner is a narrow one. It is whether the erroneous instruction on circumstantial evidence was cured by other parts of the charge indicating the burden was on the state to prove its case beyond a reasonable doubt. Pet. at i. It does not question whether the circumstantial charge was itself correct or not. It does not challenge the findings of the Connecticut Supreme Court that the jury had to use the circumstantial evidence rule to determine intent and that the trial court incorporated the rule into the definition of proof beyond a reasonable doubt. Fairly read, the question assumes the circumstantial charge was erroneous and asks the sole question of whether it was cured by the trial court's other instructions.

The stance taken in the Question Presented is not surprising because it is the same one taken by the petitioner to the Connecticut Supreme Court. There, the state did not claim the circumstantial charge given by the trial

court was correct. It did not counter the respondent's claim in his state appeal that the trial court's charge diminished the constitutional standard for the burden of proof. The petitioner's only argument was this: "It is respectfully submitted that the instant case ... should be subject to a 'whole charge' test." App. at 3A.

Yet in its Argument I, Pet. at 6-14, under Reasons For Granting The Writ, the petitioner dwells solely on the correctness of trial court's circumstantial evidence charge. The curative value of the rest of the instructions is not mentioned at all. Id. The petitioner does not address the matter raised in his first Question Presented until his argument at pages 14-17, and then he misstates the argument as one of harmless error.

This is an attempt to do indirectly what it cannot do directly. It is an attempt to avoid the respondent's legitimate claim that the petitioner lacks jurisdiction to now claim the charge was correct. Gates, 462 U.S. at 217-24. He had every opportunity to assert this in state court, but failed to do so. *3/ As the Gates case explains, the "not pressed or passed on below" rule applies in these situations where the state failed to raised a defense. 462 U.S. at 221. Failure to present the defense takes away from a state court the opportunity to modify its decision "even if it agrees with the State as a matter of federal law, [by resting] its decision on an adequate and independent state ground." Id., 222. *4/ Nor is this issue reviewable as a mere enlargement of the question presented. Gates, 462 U.S. at 219-20. Whether an erroneous charge is cured by other instructions is a separate issue from whether the particular charge was in error. Cupp v. Naughten, 414 U.S. 141, 147 (1973). For these reasons, the Court lacks jurisdiction to consider the issue raised in Argument I.

In addition, since the petitioner failed to raise the issue of the correctness of the charge in its Question Presented, this Court should not consider the claim. S.Ct. Rule 21.1(a).

3. Counsel for the petitioner on this writ was not trial or appellate counsel in the state proceedings. It is interesting to note that present counsel was involved in a previous Connecticut case involving this same issue; State v. Farrar, 7 Conn. App. 149, 152-6, 508 A.2d 491 (4/2/86); where he had no difficulty or hesitation in raising the issue to the state court. Id., 153.

4. Although the decision is silent on the matter, the respondent raised the issue in his appellant brief under both the federal and state constitution. Whelan, 200 Conn. at 755-8.

II. THE CONNECTICUT SUPREME COURT'S DECISION'S DID NOT MISCONSTRUE THE IMPORTANCE OF THE CIRCUMSTANTIAL EVIDENCE INSTRUCTION; NOR IS IT IN CONFLICT WITH DECISIONS OF THIS COURT OR THOSE OF OTHER STATES; NOR IS THE ADMINISTRATION OF JUSTICE THREATENED.

A. The Petitioner Misconstrues The Connecticut Supreme Court's Decision Which Is Supported By — Not In Conflict With — Decisions Of This Court.

The Connecticut Court's holding was not the broad, sweeping one of automatic reversal the petitioner insists upon. Instead, the decision was a carefully-drawn, narrow holding giving due consideration to the individual charge, its effect on the charge as a whole and its impact in the context of the evidence.

The charge on circumstantial evidence was the only charge given on how to to infer facts from other circumstantial facts. The trial court did not distinguish inferences made to intermediate as opposed to ultimate facts. It informed the jury that any inference — including those to ultimate facts such as the respondent's criminal intent — could be made as long as it was "more probable than not." While this standard is appropriate for intermediate inferences, it is plainly inappropriate for the ultimate ones. In Re Winship, 397 U.S. 358, 361 (1970). Here, the trial court compounded the error in its charge on intent by making direct references to its previous circumstantial evidence charge. It told the jury the only way to find criminal intent was to use inferences, and it had told the jury it was to use a more probable than not standard in doing this. Although it stated elsewhere intent must be proved beyond a reasonable doubt, it had already instructed the jury on how it reaches that conclusion — by using the diminished "more probable than not" standard.

Nowhere in the holding does the Connecticut Supreme Court state that intermediate inferences must be proved beyond a reasonable doubt. See Pet. at 6. This case involved the affect on ultimate conclusions only. In criticizing the court for authoring a broader, unwarranted result, the petitioner ignores the plain words of this and its predecessor case. State v. Rodgers, 198 Conn. 53, 58 n.1 (1985); Whelan, 200 Conn. at 755-8.

Second, despite the petitioner's assertions to the contrary, the Connecticut Supreme Court did review error in the context of the rest of the charge. 200 Conn. at 758; See Cupp v. Naughten. It found that the repetition of the reasonable doubt standard did not correct the misconception because the court

had incorporated the more probable than not standard into that very concept. Since the trial court had effectively charged that the jury may conclude intent is proved beyond a reasonable doubt by inferring it more probably than not from surrounding facts, it is of no consequence how many times proof beyond a reasonable doubt charge was stated. What was of consequence was whether the erroneous charge was corrected or somehow modified so that its impact was not misleading, and this did not happen. 200 Conn. at 758.

Third, the Connecticut Supreme Court undertook an evidentiary review of the entire case to determine whether the case should be reversed. 200 Conn. at 757-8. It found the "primary issues ... were whether the defendant intended to cause the death of the victim and whether the killing was justified by self-defense." 200 Conn. at 757-8. There was no direct evidence of criminal intent; even the surrounding facts were open to differing interpretation. 200 Conn. at 745,758. From the underlying facts it believed established, "[t]he state argued zealously" to infer the criminal intent and reject the defense. Id. Taking all of this into account, the court could not find the erroneous instruction on this focused and highly disputed factual issue could be harmless beyond a reasonable doubt. Rose v. Clark, 106 S.Ct. at 3109.

The petitioner's claim that the case is in conflict with this Court's decisions is baseless. The argument presented is admittedly difficult for the respondent to follow, for it appears that the petitioner concedes that there is a distinction between inferences to intermediate or ultimate facts and that ultimate facts must be inferred beyond a reasonable doubt. Pet. at 7-8, citing Leary v. United States, 395 U.S. 6, 36 (1969), and County Court Of Ulster County v. Allen, 442 U.S. 140, 166-7 (1979). Moreover, Ulster County directly supports the Connecticut Supreme Court's analysis of intermediate vs. ultimate facts and the burden of proof to be assigned to the latter, 442 U.S. at 156:

> It is often necessary for the trier of fact to determine the existence of an element of the crime — that is the "ultimate" or "elemental" fact — from the existence of one or more "evidentiary" or "basic" facts. [cites omitted]. .... Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced be the State, to find the ultimate facts beyond a reasonable doubt.

B. There Is No Conflict With Courts Of Other Jurisdictions.

The cases cited by the petitioner do not bear out his contention that decisions of other jurisdictions are in conflict with this case. None of the cases directly involves a trial court's charge on the burden of proof to be assigned to inferences establishing the ultimate fact of criminal intent.

Many of the cases concerned the issue of sufficiency of the evidence. Their statements that every underlying fact or inference need not be proved beyond a reasonable doubt is not in dispute. But none of these cases hold that ultimate facts may be inferred by anything less than that standard. State v. Brown, 80 N.J. 587, 404 A.2d 1111, 1113 (1979); Commonwealth v. Beckett, 374 Mass. 329, 366 N.E.2d 1252, 1260 (1977);People v. Foster, 76 Ill.2d 365, 392 N.E.2d 6, 9 ((1979);State v. Fitzpatrick, 163 Mont. 220, 516 P.2d 605, 609 (1973).

State v. Cohen, 108 Iowa 208, 78 N.W. 857, 857-8 (1899), cited at Pet. p. 10, to support its claim, contains this language which contradicts its stance and supports the respondent: "[W]e deem [the jury charge] more likely to have been thought by the jury to refer to facts or circumstances essential to the conviction, and which, according to all authorities and sound reasoning, must be established beyond a reasonable doubt." 78 N.W. at 857.

Although its language does aid the petitioner, it should be noted that People v. Klinkenberg, 90 Cal.App.2d 608, 204 P.2d 47 (2d Dist. Ct of App. 1949), is not a decision by a court of last resort. In denying a further appeal hearing in the same case, the California Supreme Court stated, "such denial does not constitute approval of the discussion definitive of circumstantial evidence and relative to the failure of the trial court to give the instructions on that subject as requested." People v. Klinkenberg, 204 P.2d 613 (1949).

Nor is State v. Davis, 25 N.C.App. 181, 212 S.E.2d 516, 518 (1975), from a court of last resort. Moreover, the court did not reach the merits but denied the claim for failure of the defendant to request the charge at trial.

Nor is United States v. Hernandez-Miranda, 601 F.2d 1104, 1107 (9th Cir. 1979), or State v. Green, 126 Vt. 311, 228 A.2d 792, 793-4 (1967), contrary to the holding of this case.

Finally, the last three cases cited all conform, according to the peti-

tioner's own statement, to the respondent's and the Connecticut Supreme Court's concerns over misleading the jury on inferences to ultimate facts. Pet. at 12; Williamson v. State, 248 Ga. 47, 281 S.E.2d 512 (1981); Pressely v. State, 295 Md. 347, 454 A.2d 347 (1983); Commonwealth v. Turner, 456 Pa. 116, 317 A.2d 298 (1974).

C. The Petitioner's Complaint About The Impact On The Finality Of Judgments And The Administration Of Justice Is Speculative.

The petitioner's argument appears to be connected strongly to its belief that the holding of this case is much broader than the Connecticut Supreme Court has ever indicated. Whatever that belief is and however narrow the actual holding, the petitioner's fears seem to be only that. At present, there have been a total of four cases in Connecticut where this issue was decided. In two cases, reversible error was found; Whelan, 200 Conn. at 755-8; Rodgers, 198 Conn. at 57-9; in two others, no error was found; State v. Reddick, 197 Conn. 115, 130-3, 496 A.2d 466 (1985); Farrar, 7 Conn. App. at 149-56. Two cases do not add up to a significant impact.

Further, as noted in the Statement Of The Case, infra, the erroneous instruction involved here was not a standard one. Standard jury instructions in Connecticut advise the beyond a reasonable doubt standard be used instead of "more probable than not." Wright, sec. 655e; Borden & Orland, sec. 3.1. Coupling this with the Connecticut Court's narrow holding, its review of the entire charge and its review of the trial evidence, the result does not appear to be a formula for for widespread, arbitrary, undeserved reversals of convictions.

III. THE CONNECTICUT SUPREME COURT DID NOT REFUSE TO REVIEW THE REST OF THE JURY INSTRUCTIONS, NOR DID IT REFUSE TO APPLY HARMLESS ERROR.

The only argument advanced by the petitioner in the state appeal was that the erroneous circumstantial evidence charge was cured by the many references to proof beyond a reasonable doubt. This, of course, is the rule of Cupp v. Naughten, not the harmless error rule of Rose v. Clark and Chapman. The former rule is a determination of whether any error exists in the charge at all, for if there is no reasonable possibility that the charge, read as a whole, misled the jury, there is no error. Harmless error comes into play if and only if a conclusion is reached that the charge as a whole is erroneous. An instruc-

tional error is nevertheless a harmless one when reviewed in the context of the evidence.

> [T]he inquiry is whether the evidence is so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption [of intent]. [underlining added].

Rose v. Clark, 106 S.Ct. at 3109, quoting Connecticut v. Johnson, 460 U.S. 73, 97 n.5 (Powell, J. dissenting, 1983). This distinction appears to be lost on the petitioner.

Under the Jurisdiction section of this brief, the petitioner argued this Court should not hear this issue because the state failed to raise it below. Additionally under the same argument, its claim that the Connecticut Court "refused" to apply harmless error is groundless. It is impossible to refuse what was not offered.

The respondent adds the ground that the petitioner has failed to argue any of the evidence in its writ, leaving to speculation why it believes the evidence was so overwhelming that it was "unnecessary to rely on" the more probable than not instruction on inferences to ultimate facts. Rose v. Clark, 3109. Either the petitioner's silence was an oversight or it was clear to it, as it was to the respondent and the Connecticut Supreme Court, that this error was not harmless beyond a reasonable doubt.

The entirety of the petitioner argument under his section II is devoted to the curative aspects of other parts of the charge, and, of course, the Connecticut Court's refusal to apply the "whole charge" test. Suffice it to say that the court did review the rest of the charge, but because the diminished burden of proof was incorporated into the intent charge and provided the only instruction on how to advance from surrounding facts to the ultimate conclusion, other instructions did not cure the charge. Whelan, 200 Conn. at 757-8; See also this brief, p.6-7.

CONCLUSION

For all of the foregoing reasons, the respondent respectfully requests this Court to deny the writ.

THE RESPONDENT
JOSEPH WHELAN

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APPENDIX TO THE
RESPONDENT'S BRIEF IN OPPOSITION

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SUPREME COURT

OF THE

State of Connecticut

JUDICIAL DISTRICT OF FAIRFIELD

NO. 12647

STATE OF CONNECTICUT

V.

JOSEPH WHELAN

SUPPLEMENTAL BRIEF OF THE STATE-APPELLEE

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STATEMENT OF ISSUE

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1

THE NATURE OF THE PROCEEDINGS AND THE FACTS

For the statement of the nature of the proceedings and the facts, reference is to the Appellee's Brief (pp 2-7) and the argument herein.

2

ARGUMENT

The trial court instructed the jury specifically on circumstantial evidence one time (see State v. Rodgers, 198 Conn. 53, 58 at N. 1) in the early "boiler plate" portion of its instructions. (T. 292-3) While appellant in his supplemental brief has set out the specific instruction, he ignores the lead-in to that instruction to wit:

> "The State does not have to prove every fact that comes into issue. It is only the essential elements of the crime which I will explain to you that must be proved beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean that you must have direct evidence supporting a fact...(T. 292)

While the specific circumstantial evidence instruction thereafter given essentially tracks the instruction considered in Rodgers, supra, 57 it should be noted that in subsequently instructing the jury as to the elements of the underlying offense, the court invariably characterized them as essential elements that need be proven beyond a reasonable doubt. (T. 298, 299, 300, 302, 303) While the court, in discussing the element of intent, gave the customary reference to circumstantial evidence, it did not at that point use the language deemed offensive in Rodgers, supra, e.g. "more probable that the fact to be inferred is true." Indeed, in recapping this portion of its charge, the court specifically stated:

> "If the State has not proven those essential elements beyond a reasonable doubt, you would not find the Defendant guilty of murder. The State is required to prove all of the essential elements of the crime beyond a reasonable doubt and those are the essential elements of murder, that is, that Mr. Whelan

stabbed the victim and when he did it is his intention to kill him. (T. 303)

In referring to the defense of justification, the court did not allude to circumstantial evidence at all and placed the burden of disproving the claim squarely upon the State and beyond a reasonable doubt. (T. 314-315, 319-310) At both the start and end of its summarization, the court reiterated that the burden proof of the elements of the charge was beyond a reasonable doubt. (T. 318, 322-3)

It is respectfully submitted that the instant case, distinguishable in a number of ways from State v. Rodgers, supra should be subjected to a "whole charge" test. State v. Marra, (95 Conn. 421, 440 (1985) While circumstantial evidence was offered and argued against the defendant here, the state's allegations in Rodgers, including not only intent but even identification and the penetration element of the sexual assault charge, depended almost entirely upon circumstantial evidence. While Rogers declined to testify at his trial, this defendant, did take the stand and, in alleging self defense, admitted stabbing the victim. In referring to the application of circumstantial evidence vis a vis the element of intent the Court did not repeat the offensive instructions, rather it clearly stated that intent was an essential element that required proof beyond a reasonable doubt. Lastly, the claim of self defense revolved entirely around the testimony of two witnesses, William Collette and the defendant and thus clearly went to the jury as a question of credibility rather than circumstantial proof of facts.

The trial court, in introducing the subject of circumstantial evidence drew the distinction between "every fact that comes in issue" on the one hand and, on the other, the "essential elements of the crime" which of course are the only matters requiring proof beyond a reasonable doubt. State v. Rodgers, supra,

58 N. 1. While it then gave the unfortunate instruction, it subsequently reiterated on a number of occasions that any essential element has to be proven beyond a reasonable doubt. Its charge on self defense included similar language. Consequently, it is urged that this court, in determining "whether an error in a charge constitutes reversible error...consider the whole charge...from the stand point of its effect on the jury in guiding them to a proper verdict. State v. Marra, supra 440-441. It is respectfully submitted that, given the charge as a whole, it is not reasonably possible that the jury was misled. State v. Marra, supra, 441. State v. Williams, 182 Conn. 262, 268, 438 A.2d 80 (1982).

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